IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.506 OF 2002

Suresh Narbharam Kachalia. ...Petitioner.
Vs.
M/s.Shakti Insulated Wires Ltd. & Anr. ...Respondents.
....
Mr.C. U. Singh with Ms.Melanie D'Souza for the Petitioner.
Mr. V.P. Vaidya for the Respondents.
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CORAM : DR.D.Y.CHANDRACHUD, J.

March 11, 2005.

ORAL JUDGMENT :

The workman is before the Court in a challenge to an order passed by the Industrial Court on 17th August 2001, dismissing his revision against an order of the Labour Court dated 21st November 2000. While holding the management guilty of an unfair labour practice under Item 1(f) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, the Labour Court directed the management to pay to the workman an amount of Rs. 1.08 lakhs in lieu of reinstatement.

2. The Petitioner was appointed in a clerical position with the First Respondent on 25th July 1963. After he had worked for nearly 23 years, he was transferred on 3rd February 1986 to the Management Accounts Department. On 5th October 1987, the Petitioner is stated to have voluntarily requested a transfer which plea is stated to have been refused on 10th October 1987. On 27th January 1989, he was transferred to the Sales Department. On 28th April 1989, the Petitioner was promoted or, in any event, upgraded to Grade M5. On 31st July 1989, the Petitioner was transferred to the Accounts Department for a period of three months. On a complaint made against him, the Petitioner was suspended for a period of four days, but it is common ground that the suspension was then revoked and neither was any chargesheet issued, nor was a disciplinary proceeding held. In October 1989, the Petitioner was once again transferred to the Sales Department in which he continued to work. On 21st September 1994, the Petitioner was once again promoted to Grade D, the Junior Officer's grade.

3. On 14th July 1995, the services of the Petitioner were terminated on account of loss of confidence. Since the case before the Court involves a question as to whether the termination on grounds of a loss of confidence was valid, it would be material to extract from the letter of termination as it stands:

> "This refers to the discussions the undersigned had with you on 6.7.95 wherein it was explained to you regarding your behaviour, attitude to work in general and many other matters that are happening in the office premises.
>
> Time and again several complaints have been received from number of staff members regarding your indecent and indisciplined behaviour. Not only that very often acts subversive of discipline have been brought to the notice of the undersigned and innumerable warning letters have been served on you. Every time you have assured of improving but till todate no improvement has been found in your behaviour and in your attitude.
>
> Not only that recently such incidents have happened which have indicated that you have acted against the interest of the management and that you have tried to jeopardize the management's position in the market. Such attitudes from an officer are not at all acceptable. After giving you several chances and finding no improvement we have come to the conclusion that you have no interest in your job and that you do not take your work seriously. Also please note that with the above recent incidents the management has lost confidence in you and it is not in the interest of the company to continue with our services any longer and that your

services stand terminated with immediate effect."

4. The Petitioner moved a complaint before the Labour Court under Items 1(b), (d) and (f) of Schedule IV of the Act. Before the Labour Court, there was a challenge to jurisdiction on the ground that the Petitioner was not a workman and, therefore, not an employee within the meaning of Section 3(5) of the Act. That issue was answered in the affirmative holding that the Petitioner was in fact a workman and, therefore, an employee within the meaning of the Act. The Labour Court held that the management was guilty of an unfair labour practice under Item 1(f), but was of the view that in lieu of reinstatement, it would be appropriate to grant compensation to the Petitioner quantified at 18 months' salary at the rate of Rs.6,000/- per month. The Petitioner was, therefore, held to be entitled to compensation quantified at Rs. 1.08 lakhs. The revisional Court dismissed both the revisions by an order dated 17th August 2001.

5. Counsel appearing on behalf of the Petitioner the

submitted that (i) The letter of termination dated 14th July 1995 was entirely vague; (ii) The complaints on the basis of which the Petitioner was sought to be terminated on grounds of loss of confidence were stale and that from October 1989 until the order of termination of 14th July 1995, there was not a single letter of complaint addressed to the Petitioner; (iii) The Petitioner was promoted in the meantime, on 28th April 1989 and 21st September 1994 and the allegations against him, if any, for the period prior to promotion must therefore lose their validity; (iv) That it is well settled that loss of confidence which is a subjective evaluation of the employer must be based on objective facts and that in the present case, there is a complete absence of any objective material, at any rate within reasonable proximity of the order of termination.

6. On the other hand, on behalf of the Respondent, the order of the Labour Court was sought to be justified by submitting that the letters of promotion that were issued to the Petitioner were strictly speaking not orders of promotion, but of upgradation.

Moreover, it was submitted that in the Written Statement instances involving the wrongful behaviour of the Petitioner had been adverted to which were fortified in the course of the Examination-in-Chief of the management's witnesses and on which there was no cross-examination. These submissions can now be considered.

7. The Petitioner was in the employment of the Respondent for 32 years prior to the order of termination. He was appointed in a clerical capacity and the finding of the Labour Court on the question as to whether he was a workman is to the effect that he continued to be a workman notwithstanding his designation as a Junior Officer on 21st September 1994. This finding of the Labour Court which was confirmed in revision, has not been challenged by the management. The grounds set out in the letter of termination dated 14th July 1995 are entirely vague and bereft of material particulars. The letter notes that complaints had been received from the staff regarding 'indecent behaviour' of the Petitioner; that he had been warned and that acts subversive of

discipline had been brought to the notice of the management. Then there is an allegation that an incident had taken place in which the Petitioner had "acted against the interest of the management" and had "tried to jeopardize the management's position in the market". There are no particulars of any instance where the Petitioner is alleged to have acted against the interest of the management or of the manner in which he has jeopardized the position of the management in the market. There are no particulars of indiscipline or of any act subversive of discipline. The letter of termination is silent on any particular incident involving wrongful conduct on the part of the Petitioner. Be that as it may, it is equally apparent that the termination of 14th July 1995 casts a stigma on the Petitioner. The order of termination on its face was not of a termination simpliciter, but a termination on grounds of misbehaviour. No disciplinary enquiry was held nor was any chargesheet issued.

8. In **L.Michael v. Johnson Pumps Ltd.**, AIR 1975 SC 661, the Supreme Court dealing with the issue of a loss of confidence

summarised the position in law as follows :

> "Loss of confidence is often a subjective feeling or individual reaction to an objective set of facts and motivations. The Court is concerned with the latter and not with the former, although circumstances may exist which justify a genuine exercise of the power of simple termination. In a reasonable case of a confidential or responsible post being misused or a sensitive or strategic position being abused, it may be a high risk to keep the employee, once suspicion has started and a disciplinary enquiry cannot be forced on the master. There, a termination simipliciter may be bona fide, not colourable, and loss of confidence may be evidentiary of good faith of the employer." (emphasis supplied).

9. The Court held that where an employer believes or suspects that his employee particularly one holding a position of confidence, has betrayed confidence, the employer can if the conditions and terms of employment permit, terminate his employment and discharge him without any stigma attaching to the discharge. But such belief or suspicion of the employer should not be a mere whim and fancy. The belief must be bona fide and reasonable and must rest on a tangible basis. The power of the employer has to be exercised objectively, in good faith, honestly with due care and prudence. If the decision of the employer is

challenged as being an act of victimisation or an unfair labour practice, the employer must disclose to the Court the grounds of his action which must be such as may be tested judicially. In **Michael's** case the Supreme Court noted that there should have been some testimony of an attempt by the workman to get at secrets outside his own orbit, some indication of the source of suspicion, proof of the sensitive or strategic role of the employee. The employer had only proceeded on the basis of an *ipse dixit* that he was suspecting the employee of divulging secrets. Moreover, the employee was given two increments in appreciation of his hard work, which the Court held, demolished the tenuous stand taken by the employer.

10. In the subsequent decision in **Chandu Lal vs. Pan American World Airways Inc.** 1985 II LLN 582, the Supreme Court held that want of confidence in an employee points to an adverse facet in his character as the essence of the allegation by the employer is that the employee has failed to live upto the expected standard of conduct which has given rise to a situation

involving loss of confidence. While holding that such a termination casts a stigma on the employee, the Court held that if the termination in that case was held to be grounded upon conduct attaching a stigma upon the employee, disciplinary proceedings were necessary as a condition precedent to the infliction of termination as a measure of punishment.

11. The position in law has been summarised in a more recent judgment of the Supreme Court in **Kanhaiyalal Agrawal vs. Factory Manager, Gwalior Sugar Company Ltd.,** (2001) 9 SCC 609 thus :

> "What must be pleaded and proved to invoke the aforesaid principle is that (i) the workman is holding a position of trust and confidence; (ii) by abusing such position, he commits acts which results in forfeiting the same; and (iii) to continue him in service would be embarrassing and inconvenient to the employer or would be detrimental to the discipline or security of the establishment. All these three aspects must be present to refuse reinstatement on the ground of loss of confidence. Loss of confidence cannot be subjective based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension in the mind of the management regarding trustworthiness or reliability of the employee must be alleged and proved. Else, the right of reinstatement ordinarily available to the employee will be lost."

12. The facts of the present case have to be adjudged from the standpoint of the principles which emerge from these decided cases. The letter of termination, as already noted, is completely vague in regard to material particulars and the material or factual basis on which the employer concluded that he had lost confidence in the workman is not disclosed. In the Written Statement which was filed before the Labour Court, the First Respondent adverted to certain instances on the basis of which the conclusion in regard to a loss of confidence was arrived at. All these incidents, it must be noted, are of the period between 1976 and 1989. The contention of the workman is that the incidents which are referred to in the Written Statement had all been dealt with and resolved in the past. But, apart from that what is material is that in the Written Statement there is not a single reference to any incident between 28th April 1989 when the Petitioner was promoted and 14th July 1995 when the order of termination was passed. On 28th April 1989, the Petitioner was placed in a higher grade, Grade M-5. Even if, as is sought to be made out by the management, the

Petitioner was only placed in a higher grade in accordance with the terms of a settlement with the Union, the fact that he was placed in a higher grade is a matter of relevance; something which had been noted by the Supreme Court in its decision in L. Michael. Thereafter, on 21st September 1994, the Petitioner was promoted to the grade of "Junior Officer" in Grade-D and the management' s own letter does refer to this as a promotion. Now in view of the well settled position in law, the incidents relied upon by the management which are prior to the date of promotion, must lose their relevance, at least in adjudicating as to whether there was any objective basis for the employer to lose confidence in the employee much thereafter, in July 1995.

13. In the context of the power of the State, to compulsorily retire an employee on grounds of public interest under Fundamental Rule 56J, the Supreme Court elucidated the governing principles of law in **Baikuntha Nath Das vs. Chief District Medical Officer, Baripada,** (1992) 2 SCC 299. An order of compulsory retirement, it must be noted, is not an order of

punishment since it does not carry any stigma or suggestion of misbehaviour. An order of compulsory retirement has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily and is based on the subjective satisfaction of the Government. Principles of natural justice are not attracted in this context. Even so the Supreme Court has held in **Baikuntha Nath's case** thus:

> "The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority." (emphasis supplied).

The decision in **Baikuntha Nath Das** was followed by the Supreme Court subsequently in **Badrinath v. Government of Tamil Nadu,** AIR 2000 SC 3243 and Mr.Justice M.Jagannadha Rao while adverting to proposition (iv) formulated in the earlier judgment, held thus:

> "It reaffirms that old adverse remarks are not to be dug

> out and that adverse remarks made before an earlier selection for promotion are to be treated as having lost their 'sting'. This view of the three Judge Bench, in our view, has since been not departed from".

In the present case, the Court is dealing with an order of termination on the ground of loss of confidence. Both as a matter of first principle and from the tenor of the order, it is clear that the termination here does involve a stigma which forms the basis of dispensing the services of the workman. The employer was clearly not entitled to rely upon stale events of a period prior to the promotion of the employee on 28th April 1989 and subsequently on 21st September 1994. After October 1989, there was not even a single letter to the workman. Though there are two alleged letters dated 19th March 1993 and 11th December 1993, these letters, according to the Petitioner were never served upon him and at any rate were not relied upon in the Written Statement as forming the basis of the conclusion of the employer of a loss of confidence. The witness who deposed on behalf of the employer admitted in the course of the cross-examination that in the letter of termination there was no specific mention of the incidents wherein allegations

were levelled against the Petitioner and that the termination letter was not preceded by any chargesheet or memo. The witness admitted that the management had not instituted or conducted any enquiry against the workman.

14. The Labour Court in the course of its judgment noted these admissions of the witness who deposed on behalf of the employer. However, the Labour Court was of the view that from the documentary material which was placed on the record by the employer it emerged that various memos were issued by the management to the Petitioner. The Labour Court held that the letter of termination was self explanatory; that it ' spoke volumes' and that it ran into four paragraphs which explain the behaviour, attitude and work of the complainant. The Labour Court relied upon the statement contained in the letter of termination that was issued by the General Manager – Personnel and Administration that a discussion had been held with the complainant-workman on 6th July 1995. What the Labour Court ignored was that the same General Manager – Personnel and Administration, who deposed

on behalf of the management stated that it was true that there was no specific mention of any incident in the letter dated 14th August 1995. The Labour Court held that the allegation of the management has not been denied by the workman either in the pleadings or in the oral evidence. This finding is directly contrary to what is stated in the earlier part of the judgment of the Labour Court where, the submission of the workman in the complaint that the allegations contained in the termination letter are false has been adverted to. The circumstance that the Petitioner was promoted in 1989 and then in 1994 has been adverted to by the Labour Court to hold that this would enable the Petitioner to prove and show that the management had committed an unfair labour practice under Item 1(f) of Schedule IV. The finding of the Labour Court to the effect that the management has found it difficult to continue the Petitioner in service despite promotion to the post of Junior Officer is ex-facie contrary to the evidence. There is absolutely no material to show that after the promotion of the Petitioner to the post of Junior Officer on 21st September 1994, there was any circumstance or for that matter any incident that

gave rise to a loss of confidence on the part of the management. In these circumstances, the only irresistible conclusion that can be drawn is that the management miserably failed to establish any ground which would sustain a plea of loss of confidence. First and foremost, there was no evidence on the part of the employer to demonstrate that the workman was holding a post of trust and confidence. Second, there is no evidence to establish that the workman abused this position or committed an act which resulted in forfeiting the confidence of the employer. Third, there was no evidence to demonstrate objective facts on the basis of which the employer could conclude that to continue the workman in service would be embarrassing and inconvenient to the employer or would be detrimental to the discipline or security of the establishment. The Supreme Court held in its judgment in **Kanhaiyalal Agrawal vs. Factory Manager, Gwalior Sugar Company Ltd.** (2001) 9 SCC 609, that all these three aspects must be present to refuse reinstatement on the ground of loss of confidence. The formation of the opinion that the management has lost confidence in an employee must be based on objective facts, something which is

lacking in the facts of the present case. The Labour Court has manifestly erred in coming to the conclusion that there was sufficient ground to hold that the management had lost confidence in the workman. The order of the Labour Court is, therefore, unsustainable and is liable to be quashed.

15. The Court has been informed that the Petitioner attained the age of superannuation of 60 years in November 2003. In the circumstances, the Petitioner would be entitled to the salary and all attendant benefits from the date of the order of termination - 14th July 1989 until the date on which he attained the age of superannuation. The Petitioner has already been paid an amount of Rs.1,08,000/- in pursuance of the order of the Labour Court. The employer would be entitled to credit for the aforesaid amount in computing the dues to which the Petitioner is now entitled in pursuance of this order. Payment stall be made to the Petitioner of the balance within one month.

16. The petition is allowed in the aforesaid terms. The Petitioner shall be entitled to his costs.

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